89-1908

NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

LORENZO W. COATS,

Petitioner,

VS.

PERCY PIERRE, ET AL.,

Respondent.

On Writ Of Certiorari To The
United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Lorenzo W. Coats
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PRO SE LITIGANT

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QUESTIONS PRESENTED

Is Lorenzo W. Coats denied the equal protection of the laws in contravention of the Fourteenth Amendment to the United States Constitution when he is treated differently in litigation than a lawyer as far as his rights are concern solely because he is a pro se litigant?

1Thomas Cleaver, Edward Martin, Jewel Berry George Brown, Seab Smith, Ronald Humphrey and The Board of Regents Of Texas A&M U. System.

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BRIEF FOR PETITIONER

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "... nor shall any State ...deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1983 provides, in per-

tinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress".

STATEMENT OF THE CASE

This is an action brought by petitioner Lorenzo W. Coats, acting pro se, against the Board of Regents of Texas A & M University System and various faculty members and administrators of Prairie View A & M University, pursuant to 42 U.S.C. section 1983. Dr. Coats alleges that he was demoted from associate professor to assistant professor, reviewed and denied tenure without his knowledge when he was already tenured, and terminated from his position without the proper notice by the

respondents in violation of his rights secured by the First and Fourteenth Amendments.

Petitioner Coats tried his own case, the district judge became angry with petitioner because he asked the respondents about sexual abuse and gave him three hours to end the case when only half of his witnesses had testified. Wile the respondents objected repeatedly to his questioning, the petitioner rushed through his case trying to get as many testimonies as possible to meet the three hours time limit. Many of his witnesses did not testify and the trial court did not see any of the more than a hundred exhibits. Before he was able to make his closing remarks, the respondents moved the court for a directed verdict. The district judge asked petitioner if he had received a termination letter from respondents and petitioner's reply was that he had not. The district judge then granted the respondents motion and stated that he did not think that this case was a frivolous lawsuit and that the parties in this action would hear from him.

Before the court could write his Order, the

respondents filed a Motion for Sanctions and Attorney's Fee (R. 74)1 in which they lied. They claimed that the petitioner brought this suit solely to harass the defendants and that he accused all the defendants of being homosexuals and also that the petitioner based his lawsuit on the grounds that the defendants did not allow him to do research and teach in his major field. These assertions are completely unfounded. Ms. Hajdar lied to the trial court through out this lawsuit and she was believed. The trial court did not remember what occurred during the trial, he did not even remember that he had granted a directed verdict (Vol. 5, p. 9).2 The trial court was swayed by respondents portrayal of the petitioner and granted their motion for sanctions and attorney fees. The real reason the court awarded $20,000.00 was because petitioner Coats responded to Ms. Hajdar's provocations with a personal attack since the court refused

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1 The record on appeal is cited herein as "R._____.")

2 The transcripts on appeal is cited herein as "Vol. ___.")

to consider any of his complaints about her behavior. While the statement was inappropriate and petitioner regrets that it was made, it certainly was not good grounds for a $20,000.00 fine. The petitioner was only being human.

The petitioner filed a notice of appeal and then a Motion For Sanctions and A New Trial or Summary Judgment (R. 75 and 76). This motion was denied because the trial court stated that

> "You have made some wild and outrageous accusations against a fine university and some fine people. Im convinced they were telling the truth and the accusations against them are a product of your own unhappiness and frustration. Your situation has caused you to bring some allegations against these people that are unsubstantiated" (Vol. 5, p. 21-22).

At the hearing, the judge was preparing for the next case and did pay attention to anything the petitioner said. The trial court would not acknowledge the fact that he did not see any of petitioners exhibits. When they were tenderded to him before trial he refused them but accepted the exhibits of the respondents and during the trial he only looked at the respondents exhibits Petitioner placed his exhibits on the exhibit table in from of the deputy clerk. After

three days of trial, the exhibits disappeared and the court wrongly accused the petitioner of withdrawing the exhibits. Petitioner did not withdraw his exhibits.

This case was dismissed with prejudice and costs was assessed against petitioner. Petitioner was ordered to pay respondents attorney's fees in the amount of $20,000.00.

Petitioner Coats challenged both the grant of directed verdict and the imposition of attorney's fees. On appeal to the United States Court of Appeals for the Fifth Circuit, the panel limited its review of the case to the available transcripts instead of all of the evidence on appeal (affidavits, depositions, and exhibits in the record referred to in petitioner's brief, etc.). As a result, the panel did not address a number of important issues in this case such as the conduct of the trial judge, the behavior of the attorney for the respondents, the demotion issue, whether the petitioner was properly terminated in accordance with the rules of the Texas A & M University

System, and whether the action of officials at Prairie View A & M University was arbitrary.

The panel stated that it limited it's review to the available transcripts because petitioner failed to include in the record on appeal a transcript of the district court's decision to grant the directed verdict, with its recitation of reasons for doing so, along with the transcripts of the testimony of several witnesses, including that of Dr. Coats. Petitioner failed to include a transcript of the district court's decision because the district court did not recite his reasons for granting a directed verdict. The only reason given by the district court for the directed verdict was at a hearing on May 13, 1988 (Vol. 5, p. 20) when sanction and attorney's fees in the amount of $20,000.00 was awarded to respondents. Petitioner's motion to supplement the record with the directed verdict transcript was denied by the appeals court. Other transcripts were not important to the issues at hand. Additionally, since petitioner was not given enough time, three hours, for the testimony of several

witnesses including his own, these transcripts would have been meaningless. The appeals court also stated that petitioner withdrew all of his exhibits after trial, rendering them unavailable to the panel. Petitioner did not withdraw his exhibits and even without the exhibits, surely the panel could have made a meaningful review of this case since most of the exhibits were read into the courts' record by the respondents in the available transcripts.

The panel apparently accepted what the respondents stated in their brief as being true without reading the transcripts or other parts of the record. In its conclusion, the panel did not mention the report from one of the tenure committees and generally got all of its facts in this case wrong.

The panel affirmed the district court's directed verdict and concluded that sanction of $20,000.00 was excessive. The case was remand with instructions that the award of sanctions and attorney's fees be reduced from $20.000.00 to $1,800.00. Petitioners motion for

a rehearing was denied.

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in Appendix A, infra.

THE TRIAL COURT

The trial court demanded that the petitioner hire a lawyer to represent him in this action. Since Judge Black did not believe the petitioner really tried to obtain a lawyer he decided to penalize him by ignoring and misleading him. The court denied the petitioner's motion to compel respondents to answer his requests for admissions (R. 61). The trial court stated that "since you are not an attorney Dr. Coats, you don't understand the subtleties of requests for admission". (Vol. 10, p. 6). The trial court granted respondents motion for protective order denying the petitioner an opportunity to have members of his tenure committee answer his requests for admissions or interrogatories. (R. 61) Respondents motion for sanctions against Coats was granted because he requested that members of his tenure committee be added to the case. Coats found out about this committee

and the names of its members at the end of discovery. This information was withheld by the attorney for the respondents (R. 42).

The trial court attempted to mislead Coats so that he could give a summary judgment in favor of the respondent. He ordered the petitioner to respond to the respondents Motion for Summary Judgment with only his affidavit on or before November 5, 1987 (V. 10. p. 13). After petitioner Coats responded to the Order with many affidavits and exhibits, the trial court then stated in his November 6, 1987 order, that the petitioner should have submitted affidavits, deposition excerpts, answers to interrogatories, and admissions and threatened Dr. Coats with contempt of Court if the affidavits he submitted were given in bad faith (these affidavits were offered to Ms. Hajdar, council for the respondents, nearly four months before they were requested by the Court). (R. 61) The trial court was angry because he was unable to dispose of this case by way of summary judgment for the respondents. The trial court also threatened the

petitioner with sanction if the allegations he made in his lawsuit were not supported by discovery (R. 31).

During the trial, the Court refused to consider all of the issues before the Court (R. 49 and 59). When Dr. Coats tried to provide evidence for all of the issues, the trial court stated that he was asking the wrong questions and implied that he didn't know what he was doing since he is not a lawyer.

The Court indicated that in order for Dr. Coats to win his case he had to get the respondents to testify that they discriminated against him (V. 6, p. 19).

Even though the trial court refused to give Dr. Coats an opportunity to present evidence regarding sexual misconduct and grades from the witnesses he called from the University and former students, he granted Defendants Motion for Sanctions and Attorney's fees in the amount of $20,000.00. because of the following reason:

> "Your allegations regarding sexual misconduct regarding grades are totally unsupported by any of the people you called from the University" (Vol. 5, p. 20)

Clearly, this is an abuse of the trial courts' discretion. Several of petitioner's witnesses who were familiar with these allegations were badgered, harassed, intimidated, and frightened away from testifying in court by the office of the attorney general (Vol. 5, p. 5). Other witnesses who were familiar with these allegations, two former students from Prairie View and the respondents were prevented from telling the court what they knew about these allegations due to improper objections from Ms. Hajdar. For example, when respondent Smith was questioned in court, the following objections were made by Ms. Hajdar:

> Q. Isn't it true that you have engaged in sexual misconduct?
> A. Ms. Hajdar: Objection, your honor, irrelevant (Vol. 14, p. 9)

When Ms. Hajdar asked respondent Pierre in deposition if he was aware of sexual misconduct he stated that he was (R. 76, Exhibit 32, p. 48), but when petitioner asked about sexual misconduct at trial, Ms. Hajdar objected:

> Q. Do you have any knowledge of sexual misconduct on campus?
> Ms. Hajdar: Objection, your honor, irrele-

vant.

Court: sustained.

Q. Would you tell the Jury why Dr. Toliver was removed from his position as vice president? (Dr. Pierre fired Dr. Toliver because he got three of his students pregnant at the same time)

Ms. Hajdar: Objection, irrelevant.

Court: Sustain the objection.

Q. Your honor, I talked about misconduct -- sexual misconduct at Prairie View.

Court: let me see counsel up here. (the following took place at sidebar:)

Court: "I have been as patient as I can be, Dr. Coats. You're asking the same questions over and over and you're asking the wrong questions. It is now five minutes after two. I'm going to give you until 5:00 to finish your case inchief. It is incumbent upon you to ask these people about what they heard you say about these things and whether that's what affected their decision to fire you not what they heard from any body else, but what they heard about your saying it. Did they fire you because you complained about freedom-things that come under the heading of freedom of speech. Every-thing else you're asking these people is totally irrelevant. You're wasting a lot of time. I'm putting you on a strict time limit, 5:00 today. That includes your testimony" (Vol. 9, p.59)

The trial court abused its discretion in not allowing the respondents to answer questions about sexual abuse and imposing a three hour time limit on the trial since half of the respondents had not testified, five subpoenaed witnesses, nor had Dr. Coats. The trial court

also abused its discretion in telling petitioner what questions to ask the respondents. The petitioner was not and did not at any time ask the respondents about what they heard from any body else (see the transcript Vol. 9, p. 59). Petitioner had a right to ask the respondents about sexual abuse since all the respondents, at trial, stated that they had no knowledge of sexual abuse on Prairie View's Campus. It was necessary for the petitioner to not only prove at trial that sexual abuse was part of his free speech activity but was in fact true and the respondents were aware of it and many of them even participated in it. The trial court clearly did not want petitioner to prove his sexual abuse allegations. How is it possible for a person to prove misconduct if the trial court deny that individual an opportunity to ask questions about misconduct?

THE ATTORNEY FOR THE RESPONDENTS

The attorney for the respondents, Ms. Hajdar, conducted herself during the trial and pretrial discovery in an entirely unprofessional

manner. She made unwarranted personal attack on plaintiff throughout this action. She used her position as a lawyer to air her own personal hostilities, prejudices and frustrations. She took advantage of the fact that she is a lawyer and objected to every motion, document, and witness petitioner presented to the trial court. She withheld evidence, tampered with the evidence, lied repeatedly to the trial court, tried to bluff petitioner into silence, intimidated his witnesses, and prevented the respondents from answering important questions during deposition and at trial. (R. 76. pp. 1-3) (T. Vol. 9, pp. 10-11) (T. Vol. 5, p.5) (R. 76. pp. 15-26).

The threats of sanctions and contempt motivated Ms. Hajdar to go after the people who wrote affidavits for the petitioner. Ms. Hajdar's office, office of the attorney general of the State of Texas, threatened and intimidated all of the people who wrote affidavits for the petitioner. Her office even went so far as to write affidavits changing the story of the petitioner's witnesses and tried to force

these people to sign the their affidavits. The news reporter who submitted an affidavit job was threatened for writing the affidavit. The Attorney general office threatened to sue the TV station this reporter works for. As a result of all the threats and intimidation, the petitioner's witnesses were frightened away from the trial.

When Ms. Hajdar's action was reported to the trial court, she stated the following: "I received those names only pursuant to the affidavit submitted by Dr. Coats in response to a motion for summary judgment. In my motion I said he had no genuine issue of material facts because no one-- there was no evidence there had been any discussion of sex for grades and so on. He comes back with these three or four affidavits saying yes he talked to us about these allegations. Then I had an obligation to go ahead and try and investigate the basis of the claims and talk to them and find out what the situation was..." (V. 5, p. 16). Ms. Hajdar did not tell the truth here, she did know about

these affidavits. Coats told her about them and offered them to her during his deposition but she didn't want to see them stating that they were his evidence (R. 44 p. 34 of Coats deposition).

ARGUMENT AND AUTHORITIES

The panel decision in this case demonstrates a callous indifference to the realities of injustice to pro se litigants. These realities may not always be obvious from the Court's vantage point, but the panel fails in its constitutional duties when it refuses, as it has in this case, to make even the effort to see. For an unemployed college professor, filing a lawsuit pro se is the only way he can hope to receive justice. In allowing the trial court to burden the access of pro se litigants to a fair trial, the court denies equal opportunity and discourages hope. I do not believe the Equal Protection Clause countenances such a result.

From the available transcripts, this Court can tell whether Dr. Coats was given a fair hearing or railroaded.

The appellate judges, as a Court of Appeals

have a duty to weigh the evidence in a case and overturn a verdict if the evidence is such that reasonable persons in the exercise of impartial judgment could not reach such a conclusion.

In the instant case, the appellate judges review was limited to reviewing the available transcripts. The panel stated in its opinion that "without Dr. Coats' testimony and theoretically, if the panel had reviewed the entire record on review, it might have found the defendants to be unworthy of belief and Dr. Coats' claims supported by a preponderance of the evidence. Thus properly determine whether the evidence in the record is sufficient to raise a jury question.

The panel and trial court erred in not considering whether Dr. Coats was entitled to continued employment as a result of the University's failure to give him notice specifically required under the regulations. In Sanchez v Board of Regents of Texas Southern University, No 75 H-1407 (U S District Court for the Southern District of Texas Houston Division,

1977). The Court found that failure to give such notice entitled the plaintiff to an additional one year contract. In the instant case, petitioner received a non-terminal contract and was not given a letter stating that he would be terminated at the end of the academic school year.

To proved by the evidence that his protected activities were a substantial factor or a motivating factor in the decision to deprive him of tenure, Dr. Coats used the rule of causation for the second prong of the Mt. Healthy test (see brief for appellant pp. 27-35). He relied upon a series of actions taken by defendants as the basis of his claim that he was the object of retaliation because he engaged in constitutionally protected activities. Mt. Healthy does not require a plaintiff to prove that protected activities were the sole cause of the deprivation of benefits.

The biology department committee recommended that Dr. Coats be denied tenure. Dr. Berry appointed this committee but he was not a part of it. When asked by Ms. Hajdar if he had any

knowledge of these remarks by Dr. Coats, only Dr. Pierre testified in deposition that he had (R. 76, Exhibit 32, p. 48). Dr. Coats testified at trial, in affidavit, and in deposition about his statutorily protected activity and that the defendants were aware of it (see R. 44, deposition pp. 18-33). This court must be reminded that the trial court prevented Dr. Coats from providing evidence related to sexual misconduct from any of the witnesses who testified at trial. Also, Dr. Coats took the biology position away from Jane Ryder who the defendants were courting, about a month before the tenure decision was made.

Since Dr. Coats proved that all of the reasons the defendants gave for denying him tenure were false and the tenure committee could not come up with one rational reason for denying Dr. Coats tenure, the evidence at least minimally supports a finding that the defendants recommendation would not have occurred in the absence of statutorily protected activity.

Members of the biology tenure committee

acted irrationally or failed to exercise their professional judgment. Substantial factual evidence was produced to show that the defendants' acts departed so widely from accepted academic norms as to demonstrate their decision was not actually based on professional judgment. It was spiteful. The petitioner was assigned to the biology department so that he could be denied tenure. This was done only a month before he was reviewed for tenure (see respondent Pierre transcript Vol. 9, pp. 21-22) and the reasons the committee gave for denial of tenure: failing to exhibit significant research, creative activities or other scholarly efforts within his academic discipline, a failure to attend departmental activities, and a demonstrated unwillingness to become involved in student departmental affairs were unfair and arbitrary since no other person at the university was reviewed for tenure after being in the department for only one month. Additionally, petitioner was the only faculty member terminated because of denial of tenure. All other faculty who were not tenured were given an extension of

their tenure status.

The panel erred by limiting its review to the available transcripts and also not considering the recommendation of the college committee which recommended that Dr. Coats reapply for tenure.

REASON FOR GRANTING THE WRIT

1. The basic issue raised by this case is whether a pro se litigant has the same rights as a lawyer in litigating a case in Federal Court. There is no indication that this issue will be resolved in the foreseeable future in the absence of a decision by this Court. The question is perhaps of the most important equal protection issue of the decade. It lies at the core of the country's commitment to real equality of justice for all of its citizens regardless of their financial situation. The nation deserves an answer to this fundamental question, particularly now since legal service is out of reach of the average citizen and this case presents an ideal vehicle for providing that answer.

2. The legitimate rights of all litigants should be preserved The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The question presented in this case is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, the trial court may deny to a pro se litigant a fair trial because he is not a lawyer. The pro se litigant in this case did not stand equal to the lawyer before the law, and was not dealt with as an equal in the trial court of justice and thus denied a fair trial. The lawyer in this case had a corner on the justice market. If you want justice, it isn't free, you have to hire a lawyer to get it for you. If you don't have any money you want receive justice.

It doesn't make any difference how educated you are, how well you understand the law and court room procedures, or how strong your case is, you are not going to be able to successfully defend yourself if you are not a lawyer. The trial court and the attorney are going to pre-

vent you from telling your story and presenting your evidence for consideration by the court. That is exactly what happened in this case. The trial court abused his discretion throughout this case and erred repeatedly (see reply brief for appellant, p. 22-24).

It appears that the only person who can defend you against a lawyer is another lawyer. So the problem feeds on itself. The pro se litigant in this case didn't have a chance since the trial court made no attempt to protect him from his adversaries, but instead, acted as an adversary himself.

There is a clear double standard in the way the trial court treated the petitioner and the lawyer in this case. True justice is suppose to be blind, but not in this case. Justice in the trial court also considered race and status and retained its frontier philosophy of punishment.

3. The trial and appeal courts erred in not considering evidence concerning petitioner's demotion. Petitioner was denied a jury decision on this issue when there was sufficient conflict

in substantial evidence to create a jury question. His rank, pay, and responsibilities were reduced and there was a clearly protected contract right in his status as associate professor as protected the registrar in Johnson v. San Jacinto Jr. College, 498 F.Supp. 555 (S.D. Tex. 1980). Since there was a reduction in pay, a reduction in responsibility, and termination, there was a demotion and the federal door should not be barred since such employee decisions do involve a sufficiently substantial claim of a denial of a property right cognizable in the federal court.

Personnel actions of a magnitude of termination do rise to a level worthy of consideration under the due process provision of the Constitution of the United States. See Johnson v. San Jacinto Jr. College, 498 F.Supp. 555, 568 (S.D. Tex. 1980) (employee with a contract as a registrar was demoted and the Court held that due process is necessary whenever there is a demotion with less pay and less responsibility); Thomas v. board of Trustees, Etc., 515 F.Supp. 280 (S.D. Tex. 1981) (an employee with a

contract to serve as assistant principal was demoted to a non-administrative position in mid-year and was entitled to due process).

The Constitution was designed to guarantee certain substantial, fundamental rights of individuals. This Court is urged to review the personnel decision in this case since it involves demotion, reduction in pay, reduction in responsibility, and termination.

4. Petitioner should not be fired from his public employment for exercise of his constitutional rights, MT. Healthy City School Dist. Board of Ed. v. Doyle, 429 U.S. 274, 283 (1977); Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Whether petitioner's statement is protected under the First Amendment is a question of law, but application of the decision of this Court in Connick is essential. If the comments made by petitioner is deemed to concern itself with matters of public concern, then the speech is protected.

5. Federal and state governments and

governmental agencies are restrained by the Constitution from acting arbitrarily with respect to employment opportunities that they either offer or control. It is clear that the officials of the state university in this case did not at fairly and reasonably. They acted capriciously or unreasonably with respect to the petitioner.

6. The appeal court erred in not completely eliminating the award of sanctions and attorney's fees against petitioner. The trial court's finding in this case is based on his decision to credit the testimony of the respondents, each of whom has told an incoherent and facially implausible story that is contradicted by extrinsic evidence. Where such factors are present, the court of appeals may well find clear error, even in a finding purportedly based on a credibility determination. See, e.g., United States v. United States Gypsum Co., supra, at 396.

So, giving full weight to all the evidence in this case, including physical or documentary evidence or inferences from other facts, the

trial court should not have directed a verdict, as it did, for the respondents. Since substantial and prejudicial error appears in the record, the judgment against the petitioner should be completely eliminated. Since the judgment in this case does not rests upon a sound principle of law, this Court should not affirm it. Petitioner's complaints cannot be considered as frivolous, since they are arguably supported by existing law or a reasonably based suggestion for its extension, modification, or reversal. Petitioner positions thus taken cannot be considered as frivolous, although they may be unsuccessful and indeed may be given short shrift. Southern Leasing Partner v. McMullan, 801 F. 2d 783 (5th Cir. 1986): Pin v. Texaco Inc., 793 F.2d 1448 (5th Cir. 1986).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

Lorenzo W. Coats

Lorenzo W. Coats, Plaintiff

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Certificate of Service

This is to certify that a copy of the foregoing document is being served on Esther L. Hajdar, Assistant Attorney General, State and County Affairs, P.O. Box 12548, Capitol Station, Austin, Texas 78711 by U.S. Mail on this 6th day of June, 1990.

Lorenzo W. Coats

Lorenzo W. Coats

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CIVIL ACTION NO. 88-2308

LORENZO W. COATS,
Plaintiff-Appellant

v.

PERCH PIERRE, et al.,
Defendants-Appelles.

Rehearing Denied Feb. 2, 1990.

Teacher, who was denied tenure and not rehired at university, brought civil rights action alleging denial of tenure was in retaliation for exercising First Amendment right to free speech. The United States District court for the Southern District of Texas at Houston, Norman W. Black, J., granted defendants' motion for directed verdict, and imposed sanctions and attorney fees on teacher in amount of $20,000, and teacher appealed, challenging both grant of directed verdict and imposition of sanctions. The Court of Appeals, Gee, Circuit Judge, held that: (1) absent testimony explaining the nature of tenure document and reason for apparent discrepancy between number seven next

to statement "total years counted toward tenure" and notation at bottom showing that only four years had been counted toward tenure, document, standing alone, did not constitute substantial evidence that teacher had received de facto tenure, for purpose of determining whether teacher had due process right to continued employment, three years prior to termination; (2) teacher failed to establish that speech was substantial or motivating factor in decision not to rehire; and (3) sanction of $20,000 against pro se litigant was excessive.

Affirmed in part and remanded in part with instructions.

1. Federal Courts 698

Failure of appellant to provide trial court statement of reasons for granting directed verdict is proper ground for dismissal of appeal; however, dismissal is not mandatory. F.R.A.P Rule 3(a), 28 U.S.C.A.

2. Constitutional Law 277(2)

To show entitlement to due process prior to termination of public employment,

employee must prove that he has protectable property interest in his continued employment. U.S.C.A. Const. Amend. 14

3. Constitutional Law 277(2)

University professor has protectable property interest in his position for due process purposes if tenure has been granted or if he can demonstrate a reasonable expectation of continued employment. U.S.C.A. Const. Amend.

14. 4. Constitutional Law 277(2)

Absent testimony explaining nature of tenure document and reason for apparent discrepancy between number seven next to statement "total years counted toward tenure" and notation at bottom showing that only four years have been counted toward tenure document, standing alone, did not constitute substantial evidence that teacher had received de facto tenure for purpose of determining whether teacher had due process right to continued employment. U.S. C.A. Const. Amend. 14.

5. Colleges and Universities 8.1(3)

Schools 147.8

Even if teacher has no protectable property interest in his continued employment sufficient to invoke protections of due process clause, he may not be dismissed or not rehired for constitutional impermissible reasons such as race, religion, or assertion of right granted by law or Constitution. U.S.C.A. Const. Amend. 14

6. Constitutional Law 90.1(7.3)

To show that teacher's First Amendment right to free speech has been violated by wrongful termination, teacher must show that this conduct was constitutionally protected, and that his conduct was substantial or motivating factor in decision not to rehire. U.S.C.A. Const. Amend. 1.

7. Constitutional Law 90.1(7.2)

For speech of public employee to merit constitutional protection, it must relate to matter of legitimate public concern. U.S. C.A. Const. Amend. 1.

8. Colleges and Universities 8.1(3)

Constitutional Law 90.1(7.3)

Teacher's allegations that the was terminated in part because of assertions by him that professors at college showed favoritism in grading toward athletes and pre-med student and exchanged grades for sex went beyond individual personal disputes and grievances and touched upon matters of public concern for purposes of determining whether teacher's First Amendment right to free speech was violated by termination; however, teacher failed to establish that speech was substantial or motivating factor in decision not to rehire, where none of members who recommended that teacher not be rehired had any knowledge of remarks by teacher. U.S.C.A. Const. Amend. 1.

9. Civil Rights 242(3)

In absence of evidence of race or skin color of other candidates granted tenure after formal review process was adopted by university, teacher denied tenure failed to establish equal protection violation on ground that he was

treated differently from light skinned blacks and whites. U.S.C.A. Const. Amend. 14.

10. constitutional Law 242.2(4)

Under rational basis analysis, tenure decision will be upheld under equal protection challenge so long as relation between criteria applied and stated purpose is at least debatable. U.S.C.A. Const. Amend. 14

11. Constitutional Law 242.2(4)

Reasons given for denial of tenure-failure to appear for classes while on official leave, teacher's threatening of his wife's life in front of her class while she was teaching, failure to exhibit significant research, creative activities or other scholarly efforts, and demonstrated unwillingness to become involved in student departmental affairs-bore at least some relationship to effectiveness of faculty member, and thus, denial of tenure would be upheld against equal protection challenge. U.S.C.A. Const. Amend. 14.

12. Civil Rights 299

Standard for award of fees under civil rights attorney fees act is different if defendant rather than plaintiff prevailed; prevailing defendant should be awarded fees only upon showing that plaintiff's action was frivolous, unreasonable or without foundation. 42 U.S.C.A. 1988.

13. Civil Rights 298

Teacher's failure to support his allegations regarding sexual misconduct in connection with grades did not warrant imposition of attorney fees against teacher under civil rights attorney fees act, where teacher had asked several witnesses questions regarding sexual misconduct, to which relevancy objections were properly sustained. 42 U.S.C.A. 1988.

14. Federal Civil Procedure 27821

Abusive language toward opposing counsel has no place in documents filed with courts, and filing of such document is one form of

harassment prohibited by Rule 11. Fed. Rules Civ. Proc.Rule 11, 28 U.S.C.A.

15. Federal Civil Procedure 2721

Although granting of sanctions under Rule 11 for filing of document containing abusive language toward opposing counsel was clearly justified, sanction of $20,000 against pro se litigant was excessive, where records of litigant's employment contracts indicated his annual income from teaching over seven year period ranged between $22,000 and $28,000. Red. Rules Civ.Proc.Rule 11, 28 U.S.C.A.

Lorenzo W. Coats, College Park, Ga., pro se.

Ester Hajdar, Asst. Atty. Gen.,, Jim Mattox, Atty. Gen., Austin, Tex., for defendants-appellees.

Appeals from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, THORNBERRY, and Gee, Circuit Judges:

GEE, Circuit Judge:

In August of 1978, the appellant, Dr. Lorenzo

Coats, was hired by Prairie View A & M University to teach biology to students not majoring in science. He was employed from September 1978 until May 1985 pursuant to annual contracts. In the fall of 1983, the Biology Departmental Promotion and Tenure Advisory Committee reviewed Dr. Coats's performance to determine whether tenure should be granted him,. ultimately recommending against it. Their recommendation was then forwarded, in turn, first to Dr. Jewel Berry, the head of the Biology Department, then to Dr. Edward Martin, the Dean of the College of Arts and Sciences, to Dr. Thomas Cleaver the Executive Vice President for Academic Affairs, and finally, to Dr. Percy Pierre, the President of Prairie View. Each of these reviewers affirmed the Committee's recommendation that tenure be denied. In accordance with Texas A & M University policy regarding faculty members denied tenure in their sixth year of service, Dr. Coats was given a terminal contract for the 1984-85 school year. Dr. Coats, acting pro se, filed suit under 42 U.S.C. 1983 against the Board of Regents of

Texas A & M University System, and various Prairie View Faculty members and administrators. Dr. Coats alleged ion his complaint that the defendants' action violated his rights to Due Process and Equal Protection and that tenure was denied him in retaliation for his exercising First Amendment rights of free speech. Dr. Coats tried his own case, at the close of which the district judge granted the defendants' motion for a directed verdict. In a later hearing, the district judge imposed sanctions and attorney's fees on Dr. Coats in the amount of $20,000. On appeal, Dr. coats challenges both the grant of directed verdict and the imposition of sanctions.

I. Record on Appeal

Rule 10(b)(2) of the Federal Rules of Appellate Procedure requires that if a finding or conclusion is challenged as "contrary to the evidence," the appellant must include in the record on appeal "all evidence relevant to such finding or conclusion." Dr. Coats has failed to include in the record on appeal a transcript of

the district court's decision to grant the directed verdict, with its recitation of reasons for doing so, along with the transcripts of the testimony of several witnesses, including that of Dr. Coats. In addition, Dr. coats withdrew all of his exhibits after trial, rendering them unavailable to us. The appellees maintain that the incomplete record in this case precludes our review.

(I) Although a judge is not required by the Federal Rules of Civil Procedure to recite his reasons for granting a directed verdict, we have "often stated that a reasoned statement is helpful not only to counsel but also to the appellate court. In all but the simplest case, such a statement usually proves not only helpful, but essential." Jot-Em-Down Store Inc. v. Cotter & Co., 651 F.2d 245, 247 (5th Cir. 1981). The failure of an appellant to provide the statement is a proper ground for the dismissal of the appeal. See, e.g., Thomas v. Computax Corp., 631 F.2d 139, 143 (9the Cir. 1980). Dismissal is not, however, mandatory.

See Fed. R. App. P. 3(a). In Gulf Water Benefaction Co. v. Public Utility Com'n, 674 F.2d 462, 466 (5th Cir. 1982), we rejected an appellee's motion to dismiss an appeal for the failure to provide a transcript, reasoning:

> it is clear that the dismissal of an appeal for failure to provide a complete transcript of the record on appeal is within the discretion of the court. The court is also mindful that "the drastic sanction of dismissal should not be imposed for minor infractions of the rules." Thus, the Court, having considered the pleadings before it and having weighed the relative hardship and prejudice to the parties, together with an examination of the applicable law, concludes, in its discretion, that it should not dismiss the appeal but should decide those issues which can be reached on the record before it.

Id. at 466 (citations omitted). Without Dr. Coats's testimony and his trial exhibits, the record in the present case offers little evidence supporting Dr. Coats's claims. although

we choose not to dismiss the appeal, the scope of our review is necessarily limited to reviewing the available transcripts and determining whether the evidence contained in them is sufficient to raise a jury question. See Boeing v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc). We conclude that it is not.

II. Directed Verdict

A. Due Process

[2.3] Dr. Coats alleges, as part of his 1983 claim, that he was deprived of procedural due process when he was demoted and terminated. In order to show an entitlement to due process, a plaintiff must prove that he has a protectable property interest in his continued employment. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). A university professor has a protectable property interest in his position if tenure has been granted or if he can demonstrate a reasonable expectation of continued employment. Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). Prior to 1983, the

year Dr. Coats was reviewed for tenure, Prairie View had no formal tenure review process. The Policies and Procedures of the Texas A & M System require that a tenure-track faculty member either be tenured or terminated by the end of that member's seventh year.

Dr. Coats contends that when he arrived at Prairie View he was credited with three years toward tenure because of his past teaching experience, and as a result, that 1982 was his seventh year, as he was not terminated at the close of 1982, he maintains that he received de facto tenure.

[4] In support of his position that he was granted three years credit toward tenure, Dr. Coats relies exclusively upon a tenure record of the University which he contends shows that in 1982 he had seven years counted toward tenure. This document, like all of Dr. coats's trial exhibits, is not in the record before us. A copy of the document has been provided in Dr. Coats's record excerpts, but as we have no way of knowing whether the document was admitted

into evidence or was considered by the court in directing its verdict, we may not consider it in our review.1

B. Retaliatory Termination

[5.6] Dr. Coats alleges that his termination was retaliatory in violation of his first amendment right to free speech. Even if a teacher has no protectable property interest in his continued employment sufficient to invoke the protections of the due process clause, he "may neither be dismissed or not be rehired for constitutionally impermissible reasons such as race, religion, or the assertion of rights guaranteed by law or the Constitution." Ferguson, 430 F.2d at 857; see Mt. Healthy City Board of Ed. v. Doyle, 429 U.S.

1. Even considered as evidence, the document is ambiguous. Although in the top portion of the document, a number seven, partially whited out, appears next to Total Years Counted Toward Tenure," the bottom half clearly shows that as of 1982 only four years had been counted toward tenure. Absent testimony explaining the nature of the document and the reason for this apparent discrepancy. The document, standing alone, does not constitute substantial evidence that Dr. Coats had received de facto tenure.

274, 283, 97 S.Ct. 568, 574, 50 L. Ed. 2d 471 (1977). In order to show that a plaintiff's first amendment right to free speech has been violated by wrongful termination, he musts how 1) that his conduct was constitutionally protected, and 2) that his conduct was a substantial or motivating factor in the decision not to rehire. Mt. Healthy, 429 U.S. at 287, 97 S. Ct. at 576. When a plaintiff has met this burden, the defendant must show by a preponderance of the evidence that the same decision would have been reached absent such motivation. Id.

[7] In order for speech to merit constitutional protection, it must relate to a matter of legitimate public concern. Day v. South Park Independent School Dist, 768 F.2d 696 (5th Cir. 1985), cert. denied, 474 U.S. 1101, 106 S.Ct. 883, 88 L.Ed.2d 918 (1986); see Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context

of a given statement, as revealed by the record as a whole." Day, 768 F.2d at 700 (quoting Connick, 461 U.S. at 147-48, 103 S.Ct. at 1690).

[8] Dr. Coats maintains that he was terminated in part because of assertions by him that professors at Prairie View showed favoritism in grading toward athletes and pre-med students and exchanged grades for sex. Indiscreet or not, such allegations do go beyond individual personal disputes and grievances to touch upon matters of public concern. Although these comments meet the first requirement of Mt. Healthy, the second requirement, that the speech be a substantial or motivating factor in the decision not to rehire, is not met in this case. To establish that his speech was responsible for the committee's negative recommendation, Dr. Coats relied at trial on the testimony of one Linda Jones. Ms. Jones's testimony, which does appear in the record, was that she attended a "civic organization" meeting in which Dr. Coats made the allegations of favoritism and sexual impropriety at Prairie View and that she related the allegations to the head of the Biology

Department, Dr. Jewel Berry, now deceased.

The recommendation not to rehire was made by a committee, or which Dr. Berry was not a member. None of the members of this committee whose testimony appears in the record testified that he had any knowledge of these remarks by Dr. Coats. Although Dr. Berry affirmed the recommendation of the committee, there was no evidence produced at trial that his decision to affirm the recommendation was influenced by Dr. Coats's charges. There is likewise no evidence that Dr. Cleaver, Dr. Martin, or Dr. Pierre, who had also affirmed the recommendation, had any knowledge of the charges made by Dr. Coats. Because the record before us contains no substantial evidence to show that the protected speech of Dr. Coats was a substantial., or motivating factor in his being denied tenure, we cannot conclude that the district court erred in granting a directed verdict as to Dr. Coats's claim of retaliatory dismissal.

C. Equal Protection

[9-11] Dr. Coats alleges that he was treated

differently from light skinned blacks and whites. As our review of the record reveals no evidence of the race or skin color of the other candidates granted tenure after the formal review process was adopted, this attempted class-based argument fails. Dr. Coats also alleges that the decision to deny him tenure was not based on any rational reasons. Under a rational-basis analysis, a tenure decision will be upheld so long as the relation between criteria applied and a stated purpose is "at least debatable." Levi v. University of Texas at San Antonio, 840 F.2d 277 (5th Cir. 1988). "The test does not permit a judge or jury simply to second-guess University officials's academic judgment concerning a tenure decision." Id. In the present case, the committee recommendation noted the following reasons supporting denial of tenure: failing to appear for classes while not on official leave; threatening his wife's life (!) in front of her class while she was teaching, 2 a failure to exhibit significant

research, creative activities or other scholarly efforts within his academic discipline, a failure to attend departmental activities, and a demonstrated unwillingness to become involved in student departmental affairs. As the reasons given for denying Dr. Coats tenure are not impermissible ones and do bear at least some relation to his effectiveness as a faculty member at Prairie View, Dr. Coats has failed to make a case showing that he was denied equal protection.

III. Sanctions and Attorney's Fees.

Following trial, the district court awarded the appellees sanctions and attorney's fees in the amount of $20,000 under Fed. R. Civ. Pro. 11 and 42 U.S.C. 1988.

[12] 42 U.S.C. 1988 provides that "the court, in its discretion, may allow the prevailing party ... a reasonable attorney's

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2. Dr. Coats's wife was also employed as a faculty member at Prairie View. One witness at trial testified that Dr. Coats walked into his wife's classroom, pointed his finger at his wife, and said. "Juanita Brooks, If you come near my house again, I'll shoot your God damn brains out."

fee." The standard under which fees are awarded differs if a defendant rather than a plaintiff prevails. White v. South Park Independent School District, 693 F.2d 1163 (5th Cir. 1982). A prevailing defendant should be awarded attorneys' fees only "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation." Id. (adopting the Title VII standard expressed in Christiansbury Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 417, 98 S.Ct. 694, 698, 54 L.Ed.2d 648 (1978)). The court must make specific findings to support its conclusions. Id.

[13] Here, the district court made only one specific finding to support its conclusion that Dr. Coats's suit was frivolous, stating, "[y]our allegations regarding sexual misconduct regarding grades are totally unsupported by any of the people you called from the university." In the record before us, Dr. Coats had asked several witnesses questions regarding sexual misconduct, to which relevancy objections were properly sustained. Having denied Dr. Coats the opportunity to bring out his purported evidence

of sexual misconduct at Prairie View, however, the district court could not properly impose attorney's fees upon him on this ground under Section 1988.

The district judge also based the imposition of attorney's fees upon Fed. R. Civ. Pro. 11. Rule 11 declares that the signature of a party on a pleading is a certificate by the signor

> that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

[14] The Advisory Committee Notes indicate that the rule builds upon and expands the equitable doctrine permitting a court to award expenses, including attorney's fees, to a party whose opponent acts in bad faith in instituting

or conducting litigation. although the district court failed to make specific findings as to its conclusion that Dr. Coats's lawsuit was groundless, it was specific as to a Rule 11 violation, stating:

> I think the language you used in your motion for sanctions and a new trial-or summary judgment on page twenty-two against counsel personally are worse than outrageous. They are unconscionable. I would be perfectly within my rights to hold you in contempt. I will not do so, however I will simply assess the sanctions.

The language referred to above-and which was indeed outrageous-was contained in a post-trial motion filed by Dr. Coats which stated that opposing counsel "acted like a little nasty dumb female Mexican pig in heat," and that she was "nothing but garbage." Abusive language toward opposing counsel has no place in documents filed with our courts; the filing of a document containing such language is one form of harassment prohibited by Rule 11.

[15] Although the granting of sanctions under

Rule 11 is clearly justified in the present case, we are somewhat troubled that such a large award was assessed against Dr. Coats, a pro se litigant. Although the record on appeal is incomplete, it does contain copies of Dr. Coats's employment contracts for his years at Prairie View, which disclose that his annual income from teaching over the seven year period ranged between $22,200-28,657. Under such circumstances we conclude that a $20,000 sanction is excessive. We now reduce the amount to $1,800. Although we feel compelled to reduce the amount of the sanctions in the present case, we do not intend to set a limit on the amount a pro se litigant may be fined, nor do we imply that the amount of a litigant's income should be determinative in the assessment of sanctions. We have simply determined that, given the conduct involved and Dr. Coats's economic circumstances, $1,800 is sufficient.

The order of the district court granting the defendants' motion for a directed verdict is AFFIRMED. We REMAND the case with instructions

that the award of sanctions and attorney's fees be reduced from $20,000 to $1,800.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. A-768

Lorenzo W. Coats,

Petitioner

v.

Percy Pierre, et al.

O R D E R

UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including May 17, 1990.

/s/ Byron R. White

Associate Justice of the Supreme Court of the United States

Dated this 3rd
day of May, 1990.